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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1523

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondent Public Service Commission of the State of New York (New York), an intervenor in the case below in support of the respondent Commission's

Opinion and Order on the legal issues presented in the present petition for certiorari, herewith files its opposition to the petition for certiorari filed by Transcontinental Gas Pipe Line Corporation (Transco) on March 28, 1980.

STATEMENT OF THE CASE

New York accepts for purposes of consideration of the petition the Statement of the Case contained therein.

ARGUMENT

While the proper treatment of unsuccessful gas supply ventures by natural gas companies, and specifically whether their stockholders or rate payers should bear the costs thereof, or should share therein, is an appropriate matter for Commission consideration in its regulation of pipelines under the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, the argument by Transco in its petition for certiorari that the Commission is required by law to reimburse the pipelines for all such expenditures falling within the "prudency" rubric is without merit. Accordingly, its rejection by the court below does not warrant plenary review by this Court.

As in the case below, Transco's actual position as to its legal rights is not made clear by its petition. It cannot be determined whether Transco is asserting the right to have all expenditures on unsuccessful but prudent plans to enhance its gas supply capitalized as part of its rate base and then amortized over a period of years, in

which event it would secure both a return *on* and the return *of* its investment, or is merely alleging that the Commission was required to allow it to recover its prudent costs. However, while the distinction is important in terms of the costs which would be imposed on gas consumers, the legal insufficiency of Transco's claims applies to the lesser claim as well as to the maximum one.

Specifically, there is no merit to Transco's principal claim, that the substitution of the original cost, prudent investment standard for ratemaking for the fair value, reproduction cost concept originally mandated in *Smythe* v. *Ames*, 169 U.S. 466 (1898), resulted in the elimination of the "used and useful" test of what utility investment was entitled to reimbursement as a matter of law, or to avoid Constitutional confiscation. Nothing in the cases cited by Transco suggests that the Commission is obligated to reimburse a natural gas pipeline for (to say nothing of providing a return on) expenditures, prudent or otherwise, which have not resulted in facilities or operations of use to the consuming public because the utility's rate base is now calculated on the basis of original plant cost rather than reproduction cost. At most, cases such as *Washington Gas Light Company* v. *Baker*, 188 F.2d 11 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952, suggest that under the end use test of *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), it lies within the Commission's discretion to permit reimbursement for some unsuccessful expenditures if the risk has not been compensated for in determining the utility's appropriate rate of return and there is some

demonstrable public benefit in requiring gas consumers to pay some or all of the costs.[1]

Nothing in the Natural Gas Act itself supports the Transco position. On the contrary, the Act's requirement in Section 7, 15 U.S.C. § 717f, that pipelines secure advance approval for the construction and operation of jurisdictional facilities connotes a Congressional intent that regulatory screening of the need for and advisability of large capital expenditures precede their imposition upon the company's customers. In conformity with this concept, the Commission does not permit a natural gas pipeline to include in rate base or otherwise recover as a cost of service expense, expenditures for construction work in progress (CWIP) on certificated facilities. Instead, when the facility is placed into service, its cost together with an allowance for interest on funds used during construction (AFUDC) are for the first time recognized in rates. Where the success of the certificated project appears to be doubtful, the Commission has conditioned the grant of the certificate to ensure that the risk of failure will be upon the pipeline. *See Tennessee Gas Pipeline Company*, 48 F.P.C. 149 (1972), *aff'd, Tennessee Gas Pipeline Company* v. *FPC*, 487 F.2d 1189 (D.C. Cir. 1973). Similarly, the Commission, in

[1] *Washington Gas Light Co.* v. *Baker, supra,* involved the question of whether utility customers should continue to pay a return on property which had been dedicated to the public and properly included in rate base but was now obsolete. No issue was raised as to recovery of expenditures never of value to the service provided by the utility.

providing that certain research and development expenditures of a pipeline can be capitalized, regardless of whether these results are used and useful to the pipeline, has provided that such rate treatment is available only where the pipeline first secured approval for the expenditure from the Commission. See 18 C.F.R. § 154.38(d) (5). The fact that the gas supply projects in issue in the present case were not "jurisdictional", since they involved proposed facilities for the production of other than "natural gas", and thus did not require Commission certification, certainly does not give them any preferential position in determining whether the costs could be recovered when the projects aborted.

Moreover, while Section 5 of the Act, 15 U.S.C. § 717d, does not prescribe any general rate making formula for determining a natural gas company's just and reasonable rates (*see FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 602), the "used and useful" concept is expressly written into the one facet of rate making—rates of depreciation—for which the Act makes special provision. Pursuant to Section 9(a), 15 U.S.C. § 717h(a), the Commission is authorized to "ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural gas company *used and useful* in the production, transportation, or sale of natural gas" (emphasis added), and no other depreciation expense may be charged by the company.

It is not necessary for this Court to consider the extent to which the Commission in its discretion may deviate from the used and useful concept. As the

Commission recognized in the orders under review, it has on occasion permitted capitalization and amortization, or only the latter, with respect to capital expenditures by natural gas companies which had not yet resulted in facilities or gas reserves dedicated to service to the company's customers, or even, in some circumstances, had turned out to be unsuccessful or non-productive.[2] In the present situation, however, the Commission concluded that no public considerations existed which would justify assumption of the risk of unsuccessful non-jurisdictional gas supply ventures by the customers rather than the stockholders of the pipeline. Transco has not purported to show that the Commission's policy has inhibited necessary gas supply efforts by it or the other major interstate pipelines, or that the increased risks of such efforts under the Commission's policy are not adequately reflected in the rates of return allowed by the Commission in rate proceedings.[3] Instead the petition for certiorari, as Transco's arguments in the Court below, is limited to the invalid claim that Transco was entitled to recover all prudent but unsuccessful expenditures as a matter of law.

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[2]It is similarly not necessary for the Court to speculate on the reasons why the Commission has on occasion permitted electric utilities to amortize as an expense (but not capitalize) some of the costs of unsuccessful atomic plants. It simply does not follow that what may be an appropriate exercise of Commission discretion under its somewhat parallel responsibilities under the Federal Power Act (which has no provision for advance certification of facilities) necessarily requires identical treatment of expenditures by natural gas pipelines.

[3]In the present case, Transco had agreed by settlement to accept a specified rate of return regardless of the outcome of the issue with respect to its expenditures for unsuccessful efforts.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 28, 1980